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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1966

No. ~~555~~ 18

JACK T. RAINWATER, ET AL.,
Petitioners,

vs.

STATE OF FLORIDA,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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Comes now the State of Florida, respondent in the above-styled cause, by and through its undersigned counsel and would show as follows:

OPINIONS BELOW

Respondent has no quarrel with the opinions included by petitioners in their petition at appendices A, B, and C.

JURISDICTION

Respondent concedes that the naked jurisdiction of this Court is probably invoked under 28 United States Code, Section 1257 (3).

QUESTION PRESENTED

Respondent accepts the question presented as posed by petitioners in their petition at page two.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Respondent accepts those constitutional provisions and statutes involved which petitioners set out in their petition at page two but would add thereto all of the sections of the federal internal revenue code as found in 26 United States Code from §§ 4401 through 4423, specifically including § 4422 thereof.

STATEMENT OF THE CASE

Respondent accepts petitioners' statement of the case as the same appears in their petition at pages three through six noting only that so much of it as may be said to constitute an argument of the cause is hereby rejected. We will not endeavor to make any corrections thereof except insofar as it may become necessary or desirable in the argument for denying the writ to be presented post.

ARGUMENT

Not unlike petitioners, respondent's primary contention will be that the use of the evidence in this state prosecution for a violation of Section 849.09, Florida Statutes, in no way violated the privilege against self-incrimination allegedly assured petitioners by the Fifth Amendment to the federal constitution as made applicable by the Fourteenth Amendment of the United States Constitution. Without regard to the view one may take of the applicability of *United States v. Kahriger*, 345 U.S. 22 (1953); *Irvine v. California*, 347 U.S. 128 (1954); and *Lewis v.*

United States, 348 U.S. 419 (1955), those cases may not be discounted in their entirety here and in no wise must they be reconsidered with a view to the correctness of their being continued as the applicable law.

In order that this Court may be fully aware of just what the actual physical exhibits were in the case below, its attention is invited to the motion in opposition to application for stay of mandate filed by respondent on or about September 28, 1966. At pages two and three thereof respondent set out a complete list and description with the page of introduction of the exhibits involved, they being both the state's and the defendant's exhibits.

We doubt that petitioners mean to say either directly or indirectly that the regulatory measures encompassed by 26 United States Code, §§ 4401-4423 were in any sense of the word meant to overrule the then existing prohibitions of the several states against gambling. Indeed Section 4422 of Title 26 specifically states the contrary.

Just as surely, at least respondent so assumes, it could not be said that petitioners' quarrel is with the constitutionality of the alleged incriminatory nature of the wagering stamp requirements. For if they do mean to suggest that they are unconstitutional as requiring one who seeks to comply therewith to incriminate himself and if this Court in its ultimate disposition of *Costello v. U.S.*, No. 41, October Term, 1966, does hold them unconstitutional then surely insofar as petitioners are concerned, all hope is gone.

If, on the other hand, they simply contend that the use of these articles in evidence against them was improper for some other reason (we know not what) then at least we understand that complaint albeit we cannot join therein.

What petitioners contend seems to be that they are placed on the horns of a legal dilemma in that they are required under federal law to keep certain records which records later became evidence in their prosecution for a violation of the law of the State of Florida. From this they conclude that it would be absurd to permit a conviction so obtained to stand. It well may be that respondent either does not understand the point they seek to make or, even worse, misses it completely but even if respondent is thought to be as absurd as we consider the dilemma of which they speak, is it not more accurate to say that what they really mean is that they were free to violate the law of Florida proscribing lotteries because in so doing they not only had not violated certain regulatory provisions of the federal law but in fact had complied with them?

One thing is certain, respondent did not say then, does not say now and is not likely to say that petitioners had to run a prohibited lottery in Florida. Respondent maintains stoutly that when and if petitioners or anyone else operates a lottery prohibited under Florida law, they are subject to prosecution without regard to any alleged compliance with federal regulations over such activities.

Speaking of the federal regulations, we consider it appropriate to observe that the regulations have nothing to do with the operation of the lottery. They are simply in existence to insure (for tax purposes) the federal government a fair count. If an ordinary citizen may, at the instance of the Internal Revenue Service, be required to back up his deductions and/or exemptions, have these regulatory provisions done anything more than spell out that same requirement to those who elect to purchase a federal wagering stamp and operate therewith? It was

never the intent of the legislation enacting the wagering stamp or indeed the Internal Revenue Service regulatory provisions occasioned thereby, to insure those purchasing a stamp and complying with the records requirements that they were free to violate a state's laws with impunity. See § 4422, supra.

If we adopt the rationale of petitioners, would it not follow that one who manufactures moonshine in the dim recesses of Florida's "piney woods" and pays the federal tax thereon would be free from criminal prosecution at the hands of the state authorities for having in his possession in Florida that same moonshine on which he failed to pay the state tax? Conversely, could it be said that he could escape federal prosecution for not having paid the federal tax on that moonshine by the simple advent of paying the state tax thereon? Respondent's observation is that if the former is true, then surely the latter must as well be true and yet who among us would characterize that as anything but an incredible suggestion? Florida has no interest in and indeed no jurisdiction to prosecute one who possesses moonshine whiskey but has failed to pay the federal tax thereon—it is indeed quite limited to a prosecution for having failed to pay the state tax thereon. Certainly the reverse is true.

It is incorrect to say that either directly or indirectly petitioners were rendered immune from state prosecution here simply because a search happened to reveal the existence of certain matters of physical evidence set out above without regard to whether those articles were within the contemplation of the regulatory provisions of the Internal Revenue Service. Can there be any doubt but that petitioners could have been prosecuted criminally for income tax evasion based upon the very records they say they were required to keep? We think not. If indeed the federal government could so prosecute them, how can it be said that the State of Florida surrendered its right to prosecute these petitioners when they purchased a federal wagering stamp and allegedly kept certain records. We know of no provision of either constitutional, statutory, or case law at the federal level

or otherwise which directly or indirectly suggests such an obviously desirable (as to petitioners) outcome.

Indeed the question recurs with alarming frequency. What petitioners really mean to suggest is that they have the option of complying with the federal regulatory provisions here involved and hopefully defeating a state conviction secured *inter alia* with the records to which those provisions relate.

Should not their complaint be against the legislation requiring the keeping of the records and a federal prosecution for the failure to do so? This must be so because it is the federal regulation upon which they bottom their complaint and not *vel non* the state conviction. Respondent contends that if their plea of forced incrimination has any validity, it must be one directed to the legislation or regulations which require it and not to matters jurisdictionally independent thereof.

To hold otherwise would be to vest in every given violator, present or future, the choice of violating Florida's law against gambling certain in the knowledge that he could get his conviction reversed simply by showing compliance with these regulations. It occurs to respondent that this perhaps is a classic example of the tail wagging the dog. It is bad enough that the lay consensus today is that the criminals have all the best of it—a ruling by this Court in accord with petitioners' wishes would surely remove all doubt thereof. Indeed it would go to the end of the horizon in giving a green light to violations of state criminal laws by the simple expedient of compliance with federal regulations.

It must be remembered that there is no federal proscription

against lotteries or wagering as a substantive crime. The only limitation is one requiring a federal wagering stamp and as an adjunct thereto, the keeping of certain records, so that those covered thereby might prove up their returns should the Internal Revenue Service consider it necessary. If they comply with these mandates, they certainly get no immunity from a state gambling prosecution based upon evidence which included records kept in such compliance. See *Bartkus v. Ill.*, 359 U.S. 121, 3 L. ed. 2d 684, 79 S. Ct. 676, reh den 360 U.S. 907, 3 L. ed. 2d 1258, 79 S. Ct. 1283, and *Abbate v. U.S.*, 359 U.S. 187, 3 L. ed. 2d 729, 79 S. Ct. 666.

Adverting to the constitutionality about which petitioners so glibly speak, certainly the cases of *Shapiro v. U.S.*, 335 U.S. 1, 92 L. ed. 1787; *United States v. Kahriger*, supra, and *Lewis v. U.S.*, supra, are still applicable. If they find that concept not so much to their liking, then the compelling resume submitted above should be more than enough reason to find that the court below was eminently correct in ruling as it did.

So much of petitioners' complaint as may be said to have its genesis in the fact that the search was conducted by federal authorities rather than state authorities must as well die from exhaustion. If there be anything to that contention, it would have to follow that if (unlike here) the state authorities had exclusively been responsible for the search and seizure and the subsequent prosecution and conviction with the same evidence it would not necessarily be violative of federal law. However, we observe that the exhibits or physical evidence is the same as that allegedly required under federal law and which would have been used under a federal prosecution. We observe that the search here involved was found to be legally antiseptic after several assaults thereon with the articles simply being turned

over to the state authorities and prosecution based thereon.

How foolish it would be to urge that the state could prosecute in the one instance and not in the other. With the principals, the crime, and the evidence being identical, hopefully such a position could never satisfactorily be urged in this or any other court.

Even more absurd would be the suggestion that petitioners could never be prosecuted for a violation of Florida's lottery law if they were simply careful enough to keep on the premises of their nefarious endeavor only those records required under federal law.

CONCLUSION

It is respectfully submitted that the decision of the District Court of Appeal in and for the Third District of Florida was eminently correct and the petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney General
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Assistant Attorney General
State of Florida
Counsel for the Respondent.

PROOF OF SERVICE

This is to certify that I have forwarded a copy of the foregoing Response to Petition for Writ of Certiorari to the Honorable Alfred L. Scanlan, 734-15th Street, N.W., Washington, D.C. 20005, counsel for the petitioners, by mail, this_____ day of December, 1966.

GEORGE R. GEORGIEFF
Assistant Attorney General
State of Florida

Of Counsel for the Respondent.